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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Amendment of the Commission's Rules To)
Establish New Personal Communications)
Services)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

) GEN Docket No. 90-314
) RM-7140, RM-7175, RM-7618
)

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OPPOSITION OF GTE MOBILNET INCORPORATED

GTE Mobilnet Incorporated ("GTE Mobilnet"), on behalf of itself and its corporate affiliate, GTE Macro Communications Corporation ("GTE Macro"), by its attorneys, hereby opposes the Cincinnati Bell Telephone Company ("CBT") Petition To Implement Mandate of United States Circuit Court of Appeal for the Sixth Circuit,¹ filed December 8, 1995, in the above-captioned docket ("*CBT Petition*") to the extent that CBT seeks "a moratorium on further construction of PCS service facilities or the exercise of PCS licenses in the Cincinnati MTA"² and otherwise calls into question the validity of the existing authorizations for A and B block PCS authorizations.³

GTE Mobilnet and GTE Macro have a direct interest in the arguments made in the *CBT Petition*. Initially, GTE Mobilnet now holds the block B PCS authorization for the Cincinnati-Dayton MTA, the area in which CBT apparently is most interested.⁴

¹ See *Cincinnati Bell Telephone Co. v. FCC*, Case No. 94-3701/4113 (6th Cir. Nov. 9, 1995).

² *CBT Petition* at 6.

³ See *id.* at 4-5.

⁴ See *CBT Petition* at 5-6.

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In addition, GTE Mobilnet holds authorizations for PCS operations on the B block in the Atlanta and Denver MTAs, and GTE Macro holds the block A PCS authorization for most of the Seattle MTA.⁵ These other PCS authorizations clearly also would be put at risk if the Commission grants the full scope of the relief requested in the *CBT Petition*.⁶

GTE Mobilnet opposes grant of the relief requested by CBT, at least to the extent that such relief implicates the already granted A and B block licenses. CBT's proposal would be highly disruptive to the ongoing, substantial efforts of the PCS license holders to implement their authorized systems and would thwart achievement of the Commission's goal of prompt deployment of PCS. Moreover, while the desired Commission action seems clear to CBT, it is not so obvious that its proposal is the only means for implementing the Sixth Circuit mandate. Critically, both Supreme Court and D.C. Circuit precedent suggest that the rule changes advocated by CBT may not be applied retroactively to the A and B block licenses but may prospectively affect only future PCS license awards.

Beyond GTE Mobilnet's substantive concerns with the *CBT Petition*, the filing appears to be procedurally defective. CBT has not filed its request in the individual application files for each A and B block authorization, despite its request that the

⁵ In addition, there is pending before the Commission an application seeking consent to the assignment of the Spokane-Billings MTA block A PCS authorization to GTE Macro.

⁶ See *id.* at 4-5.

Commission take action directly affecting such authorizations. Indeed, CBT's filing, to the extent that it addresses the A and B block licenses, appears to be an untimely filed petition for reconsideration of the license grants made by the Commission nearly six months ago. Moreover, CBT had available to it other means for protecting its interests -- that it failed to pursue -- that would have been far less disruptive to the public interest.

A. CBT's Plan Would Impede the Efforts of Licensees To Construct and Operate PCS Systems

CBT requests the Commission to call a specific halt to the construction and other activities of the PCS licensees located in Cincinnati as well as implement some undefined procedure for reassigning block A and B PCS licenses pursuant to revised cellular-PCS cross-ownership rules proposed in the *CBT Petition*. The *CBT Petition* fails to take into account the adverse effects of such action on the public interest. The A and B block authorizations were granted nearly six months ago, and PCS licensees like GTE Mobilnet and GTE Macro necessarily are well underway in their efforts to implement their authorized systems in order to meet Commission build-out requirements.⁷ This effort entails the expenditure of substantial resources in designing the system, obtaining sites (including required zoning clearances), constructing transmission as well as other operational facilities, establishing marketing plans, and developing the necessary service infrastructure. In addition, PCS licensees around the

⁷ See 47 C.F.R. §24.203 (1994).

country are engaged in negotiations to relocate existing fixed microwave licensees in order to permit implementation of their respective PCS systems.⁸

Grant of the relief proposed in the *CBT Petition* would halt this activity in many areas, not only in Cincinnati but elsewhere as well. Even if a moratorium on licensee activities was not specifically imposed on PCS licensees other than in Cincinnati-Dayton, Commission adoption of procedures "by which those licenses in areas where parties were adversely affected by the old attribution rule would be reassigned in accordance with proper eligibility rules"⁹ would bring a halt to most planning, construction, and relocation activities throughout the country.¹⁰ The uncertainty about the future status of their licenses and their ability to operate the systems authorized by such licenses would remove any incentive or business justification for continuing with system implementation. Clearly, no carrier would continue to devote substantial resources to system build-out where adoption of CBT's proposals could lead to the eventual loss of that license.

The result of any actual or *de facto* moratorium would be a delay in the initiation of PCS operations around the country. This would run directly counter to the

⁸ In addition, the block A and B PCS licensees have paid over \$7 billion to the U.S. Treasury for their authorizations.

⁹ *CBT Petition* at 5.

¹⁰ Even if the Commission limited its action in response to the *CBT Petition* to only the Cincinnati MTA, favorable treatment on CBT's arguments would encourage other entities to resort to similar claims against the A and B block licensees in the remaining MTAs.

Commission's stated policies for bringing PCS promptly to the marketplace and for increasing the number of wireless service offerings from which the public may choose.¹¹ The public interest would thus be disserved by granting the CBT requested relief.

B. The Relief Sought by CBT Is Not Mandated by the Sixth Circuit Opinion

CBT proposes that the Commission adopt an amendment to Section 24.204(d)(ii) of the Commission's Rules as well as any related rule revisions to provide that "[n]o minority stock or limited partnership interest will be attributable if a single holder (or group of affiliated holders) owns more than 50% of the outstanding stock or partnership equity or has voting control of the licensee's affairs."¹² CBT asserts that this revision will address the concerns it raised before the Sixth Circuit, and that the rule can be immediately adopted without further rulemaking proceedings in light of the existing record in this docket.¹³

The Sixth Circuit opinion does not necessarily need to be implemented in the manner suggested by CBT. The concerns expressed by the Sixth Circuit conceivably could be resolved in a number of ways, which may or may not include CBT's

¹¹ *E.g.*, Deferral of Licensing of MTA Commercial Broadband PCS, DA 95-1410, ¶32 (June 23, 1995); Deferral of Licensing of MTA Commercial Broadband PCS, DA 95-806, ¶4 (Apr. 12, 1995); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 6858, 6864 (1994); Personal Communications Services, 8 FCC Rcd 7700, 7704 (1993).

¹² *CBT Petition* at 4.

¹³ *Id.* at 4 & n.8.

suggestion. For example, the Sixth Circuit appeared to leave open the opportunity for the Commission to retain its existing cellular-PCS cross-ownership rules unchanged, provided that the Commission supplies "a reasoned explanation as to why the less restrictive alternatives described above [in the Court's opinion] are insufficient."¹⁴ Thus, resolution of the *CBT Petition* is not necessarily as simple or direct as suggested by CBT.

C. If the Commission Adopts the Eligibility Amendment Suggested by CBT, the Revised Rule Should Be Applied Only Prospectively

CBT seeks to have its proposed rule amendments applied retroactively to already granted licenses, as well as prospectively to future rounds of PCS license assignment. GTE Mobilnet opposes retroactive application of any such rule amendment in light of the adverse effects such action would have on the public interest, as discussed above. Moreover, the Supreme Court has stated that:

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.¹⁵

The Communications Act does not appear to grant to the Commission the authority to apply CBT's proposed revised rules retroactively to the A and B block licenses.¹⁶

¹⁴ Slip op. at 13.

¹⁵ *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). See also *MCI v. FCC*, 10 F.3d 842, 846 (D.C. Cir. 1993); *Motion Picture Association of America v. Oman*, 969 F.2d 1154, 1156 (D.C. Cir. 1992).

¹⁶ See 47 U.S.C. §154(i) (Supp. V 1993).

Accordingly, at most the Commission can apply any amended rules on a prospective basis.

D. To the Extent That CBT Seeks To Modify or Otherwise Affect Block A and B PCS Licenses, Its Filing Is Defective

The *CBT Petition* proposes rule amendments associated with its interpretation of the Sixth Circuit opinion, and thus is properly considered in the above-captioned rulemaking docket. By also proposing either conditions to or revocation of already granted licenses, however, CBT is seeking to affect specific authorizations granted by the Commission. As such, the *CBT Petition* should have been filed in each of the individual block A and B PCS authorization files and should have been served on each of the licensees or their respective counsel.¹⁷ The caption gives no indication that the *CBT Petition* was filed in the respective application files, and a review of the service list attached to the *Petition* suggests that a copy of the filing was not served on all of the PCS licensees or their counsel. Accordingly, the *CBT Petition* cannot be granted in its current form without following Commission policies designed to protect the interests of license holders.

The *CBT Petition*, at least as it relates to any changes in the already granted PCS authorizations, is defective in another respect as well. CBT's tardy proposals to impede licensee implementation of their authorized facilities must be viewed as an untimely petition to deny the underlying applications or an untimely petition for

¹⁷ See 47 C.F.R. §24.830(a) (1994).

reconsideration of the grant of the licenses. The applications for the winning A and B block PCS auction winners were placed on public notice as accepted for filing on April 12, 1995.¹⁸ As a result, petitions to deny such applications were due on May 12, 1995.¹⁹ CBT did not file any petition to deny with respect to the Cincinnati-Dayton MTA applications or any other applications.²⁰

On June 23, 1995, the Commission denied all petitions to deny and granted the authorizations to all of the A and B block PCS auction winners.²¹ Petitions for reconsideration of the license grants were due 30 days thereafter.²² CBT again made no filing. Although CBT could easily have raised its concerns at that time, and specifically requested the Commission to condition the licenses to take account of the pending appeal, CBT instead chose to wait until nearly six months after the license

¹⁸ See *FCC Public Notice*, Report No. CW-95-09 (Apr. 12, 1995).

¹⁹ See *id.*

²⁰ See *FCC Public Notice*, Rpt. No. CW-95-3 (May 15, 1995).

²¹ See *Deferral of Licensing of MTA Commercial Broadband PCS*, DA 95-1410 (June 23, 1995); *Applications for A and B Block Broadband PCS Licenses*, DA 94-1411 (June 23, 1995); *Application of WirelessCo for a License To Provide Broadband PCS Service on Block A in the San Francisco Major Trading Area, et al.*, DA 95-1412 (June 23, 1995); *Application of Pacific Telesis Mobile Services for a License To Provide Broadband PCS Service on Block B in the Los Angeles-San Diego Major Trading Area*, DA 95-1143 (June 23, 1995); *Application of Pacific Telesis Mobile Services for a License To Provide Broadband PCS Service on Block B in the San Francisco-Oakland-San Jose Major Trading Area*, DA 95-1414 (June 23, 1995).

²² 47 C.F.R. § 1.106 (1994).

grants. Clearly, reconsideration of the Commission's license grants at this time is untimely, and CBT's proposal to do so must be rejected.

E. CBT Could Have Protected Its Rights in a Manner Less Disruptive to the Public Interest

As discussed above, CBT has chosen to propose that the Commission take action that would disrupt the prompt implementation of PCS throughout the country and delay the public benefits of PCS deployment. CBT had available to it, however, mechanisms for protecting its rights that would have been far less disruptive to the public and to the wireless marketplace. Specifically, CBT could have participated in the auction, where it may or may not have been the winning bidder for one of the A or B block licenses.²³ Assuming it had been the high bidder, however, it could have litigated with the FCC subsequent to the conclusion of the auction issues with regard to CBT's divestiture of the cellular interests conflicting with the FCC's then existing cellular-PCS cross-ownership rules. This would have permitted CBT to obtain its desired PCS authorization, to resolve its concerns with respect to the Commission's limitations on its ownership of cellular and PCS interests in the context of that specific market, and to do so in a manner that did not disrupt the entire PCS deployment process.


²³ It is entirely speculative whether CBT would have been the successful bidder for the Cincinnati-Dayton MTA license or for any other PCS license.

CONCLUSION

The Commission should deny the *CBT Petition* to the extent it seeks to affect the A and B block PCS licenses. As demonstrated above, CBT's proposal is highly disruptive to the public interest and may not be retroactively applied to the already granted authorizations. The Commission should promptly act to resolve this matter and ensure that PCS implementation under the existing licenses is not adversely affected by the CBT filing.

Respectfully submitted,

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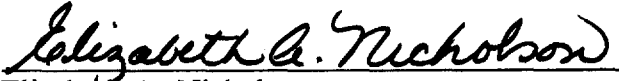
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December 15, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1995, I caused copies of the foregoing "Opposition of GTE Mobilnet Incorporated" to be mailed via first-class postage prepaid mail to the following:

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